assessment of seven and a half per cent. on the original amount of all premium-notes held by the company and in force on the 27th day of November 1869, and by such assessment assessed upon the premium-note of the defendant the sum of seventy-five dollars for the purpose of paying losses incurred by the company by damage by fire. The assessment was laid to pay losses, but the pleader has wholly failed to state whether the sum assessed was less, greater or precisely equal to the amount of losses, or whether they were such losses as accrued while defendant was a member of the company, and for which he would be liable. The legal right to assess the defendant must be clear on the face of the declaration. If the policy had expired, the defendant could not be held without alleging that the loss accrued before its expiration. If the policy was alive, the losses must have occurred while it was in force: *Long Pond Ins. Company* v. *Houghton*, 6 Gray 77; *Savage* v. *Medbury*, 19 N. Y. 34.

It does not therefore appear that the assessment was laid upon the basis authorized by the corporation act.

These are substantial infirmities in the declaration, and therefore there must be judgment for the defendant.

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*Supreme Court of Michigan.*

THOMAS W. HAMILTON *v.* THE PEOPLE.

An examination before a magistrate on a criminal charge is not invalidated by a continuance to the 22d of February, and after taking testimony on that day being continued to the 23d, although by law the 22d was *dies non juridicus*, and assimilated to Sunday.

Where counts in a criminal information are misjoined, the court is not bound to quash the information on motion, if the counts relate to one transaction, and the court can regulate the evidence by confining it to that transaction and preventing the surprise or confusion of the defendant.

While evidence is admissible to show motive in the accused, yet where the crime charged was the burning of a barn belonging to himself, in order to get the insurance, the record of a suit in equity against him to recover the barn, &c., where he had filed an answer denying the complainant's equity, &c., was too remote to be admissible for the purpose of showing motive.

Where evidence is circumstantial, a wide latitude should be allowed to defendant in cross-examination to show the whole bearing of the facts alleged.

Where a co-defendant in a criminal case turns state's evidence and has tried to convict others by proof also convicting himself, he will be held to have waived all privilege of refusing to answer as to any facts bearing on the issue. And this

waiver extends to all communications made to his counsel, so as to make both himself and his counsel compellable to disclose such communications.

Where a party asking a question gets an answer that is not responsive, but which would have been admissible in answer to a question calling for it, the other party has no right to object to it and have it stricken out of the testimony.

Evidence to impeach a witness must be confined to his reputation for veracity, but the attacking witness having shown his knowledge on that point may be asked if he would believe the other on oath.

The phrase, the jury in criminal cases are judges of the law as well as the facts, is true so far as that the jury must render a general verdict on their consciences as to the legal and actual guilt of the accused, and cannot be compelled to separate the law and the facts. But the duty of the jury is the same in kind in criminal as in civil cases, and the fact that an acquittal whether right or wrong is not reviewable, does not lessen the duty of the jury to obey the law as laid down by the judge, without regard to their personal opinions as to what the law is or ought to be.

THE appellant was tried upon an information charging him with setting fire to a barn for the purpose of obtaining money from an insurance company. The information contained a number of counts, some charging him jointly with William and James Hamilton and William Fuller, some joining only Fuller, and others omitting one or more of the other defendants in the alleged acts. Some of the counts also charged the barn as the property of defendant, some as the property of defendant and other persons jointly, and some as the property of third persons only. Defendant was tried separately and convicted upon circumstantial evidence and the testimony of Fuller, one of the co-defendants, who was sworn as state's evidence. Defendant sued out this writ of error. The other facts sufficiently appear in the opinion.

*Wm. H. Brown*, *John C. Patterson* and *M. S. Brackett*, for plaintiff in error.

*Byron D. Ball*, Attorney-General, for the people.

The opinion of the court was delivered by

CAMPBELL, J.—Much of the record relates to various rulings and proceedings upon pleadings in abatement, which preceded the issue of not guilty. The plea relied on was that the complaint before the justice of the peace was brought on for examination on the 21st of February 1872, and after it had been partly completed was adjourned until the 22d, when some further testimony was taken, and an adjournment had till the 23d, and thereafter proceedings went on to completion. The objection is that the 22d of February being not a law day the justice lost jurisdiction.

This cannot be sustained. The justice, in these examinations, does

not act judicially in the technical sense, but in his capacity of a conservator of the peace, and the proceeding is one which at common law was conducted very much at discretion. We have found no authority for holding that a criminal examination before a justice is void, if a complaint has been made before him on oath, and the accused are finally held to bail or committed on a law day upon testimony taken in their presence in pursuance of it, so long as there is no substantial break in the proceedings. No legal record is required to be kept of them, and the continuance from day to day is not such an adjournment as that the failure to announce it would be of any consequence. The statute contemplates the proceedings as continuous unless formally adjourned from time to time, and the close of business on one day would carry it over until the next business day as a matter of course, unless otherwise ordered. The adjournment to the 22d, if illegal, would not interrupt the legal course which would take the matter over to the 23d.

There was a preliminary examination upon a proper complaint before a magistrate having jurisdiction, resulting in a commitment, and this was all that was necessary to justify proceedings by information.

It was moved to quash the information, chiefly because of the misjoinder of counts, the insufficiency of some of them, and the want of preliminary examination on some of the charges. It was held in *Washburn* v. *People*, 10 Mich. 372, that the fact of examination need not be alleged in the information, but that the objection must be made by motion to quash, or by plea in abatement. The motion does not claim that there was no examination, but only that it did not cover all the counts, and the counts so objected to are not specified. The objection therefore is not tenable in the form resorted to, as the motion to quash the whole information could not properly prevail on this ground. The question of misjoinder is more serious. The complaint and the information are both so confused and multifarious that the court below might properly have declined to compel the defendants to go to a trial. Offences are charged on which all the defendants could not possibly be amenable. Some counts charge no offence at all. Others contain the charges upon which it is supposed that the trial was really had, and to those there is no fatal objection, as the rules of criminal pleading under our statutes justify the introduction of various counts charging the ownership of property burned and the position

of the respondents as principal or accessorial offenders, in different ways: *Annis* v. *People*, 13 Mich. 511. It is intimated in *King* v. *Kingston*, 8 East 41, that a demurrer would not lie to the whole information for such a misjoinder, but that a proper remedy was by motion to quash. Such a motion is addressed to the court's discretion (1 Bish. Cr. Pro., § 447), and ought to be granted where the confusion is such as to be likely to interfere with the means of defending, by misleading or perplexing the prisoner in meeting the case or preparing for trial. But no wrong is done by refusing it, where the court can prevent mischief, as it usually can, by confining the proof to the single transaction on which the defendant was examined, or on which the prosecution has opened the testimony, or by compelling an election in the outset. But we do not hold that such a motion is always discretionary under our statutes requiring a motion to quash in lieu of a motion in arrest or to save a ground of error. Where the various counts may all refer to the same transaction, the safer course is usually not to quash, but to regulate the proof on the trial as far as necessary to prevent the surprise or misleading of the prisoner, and to confine it to that transaction: *Rex* v. *Young*, R. & Ry. 280 (n.); *Rex* v. *Ellis*, 6 B. & C. 145; *Anonymous*, 2 Leach C. C. 105. The propriety of allowing proof of the entire transaction was sustained in *People* v. *Marian*, and *Van Sickle* v. *People*, at the January term. In fine, there was no ruling below which can properly be reviewed, which made it erroneous to put the respondents to their trial, although the misjoinder was gross and improper.

The theory of the prosecution depended on Fuller's evidence, he swearing to a plan, made in advance, to burn the barn in question by putting a lighted candle in a place, where as it burned low, it would reach litter and other combustible material and set it on fire. The conviction was upon circumstantial evidence deriving its force chiefly from Fuller's explanation, without which no conviction could have been justified.

The first ruling objected to related to the admission of certain evidence which the court afterward refused to strike out, showing that in 1869 a bill was filed to rescind the conveyance of the land on which the barn stood for fraud alleged to have been practised by Thomas W. Hamilton and Nathaniel Badger. The object of the testimony was to establish a motive for the destruction of the property by showing a dispute affecting title. Evidence of such

an existing controversy might have some bearing on the question of motive, though it may be difficult to guard it so as to prevent the jury from passing upon the facts of that controversy, which could not lawfully be done. But as the files showed that the case had been brought to an issue on bill, answer and replication, more than a year before the fire, and that no proofs had been taken, and as it was then too late to take proofs, and the answer denied the equity of the bill, leaving the defendants vindicated as the case stood, the introduction of the bill as evidence of motive was injurious and erroneous. Still more objectionable was the introduction of foreclosure proceedings, begun after the fire, which could furnish no proof of motive, for the condition of the title at the time of the fire was open to proof more directly. No other legitimate inquiry could have been aided by proceedings *ex post facto*.

Evidence of the amount of hay in the barn was objected to, as there was no valid count charging the burning of anything but the barn, and the respondents had not been examined upon such a charge. The fulness or emptiness of the barn might bear clearly on the question of motive; there was no reason for excluding any circumstance showing the extent of the fire and of the property burned, and the jury was entitled to understand the whole transaction. The testimony in regard to playing cards in the barn with lights should have been allowed to be fully given. Fire might take from such a cause, and the defence were entitled to show all circumstances reasonably bearing on such a possibility.

Testimony of a witness that in a conversation four or five months after the fire, Hamilton, when asked whether he would keep the farm, said, "He did not care, that he had got a good insurance on the house, and it might go to blazes with the barn," was not proof of any admission that the barn had been burned by him, and that was the only point on which it can be claimed to have had relevancy. Thomas W. Hamilton could not be charged with William Hamilton's false statement, the day after the fire, that the building was not insured; it was not a part of the *res gestæ*. It could not aid in defrauding the insurance company, and must be regarded as an independent assertion or act within the excluding rule in *People* v. *Knapp*.

Henry Hamilton testified concerning what took place at a certain party or dance at James Hamilton's, the night of the fire. Being asked on cross-examination whether the dance was not talked of

some time before it was got up, this was objected to. The defence stated that they proposed to show that it was talked of and invitations given a week or ten days beforehand. The court ruled out the question, and the defence excepted. Fuller says the plan was that to prevent suspicion, a dance should be got up at another person's house, and that during the evening one of the Hamiltons should go out for cider, taking advantage of the opportunity to light the candle, which would take some time to burn down to the straw, so that they should be away at the party when the fire broke out, and would escape suspicion. Now, if the party had been arranged and invitations given earlier than the alleged interview with Fuller, his whole story would be falsified; so this was a vital point in the case, and the question asked was very clearly legitimate cross-examination upon the strictest rules. The objection that it would not contradict Fuller would not destroy its relevancy even if true, and its truth would be a question of fact. The court erred in shutting out this proof.

When the witness Houseman had sworn to seeing the three Hamiltons apparently consulting together after the fire, the defence should not have been precluded from cross-questioning him as to the force of the impression made on him at the time, and as to where he first mentioned it. It is only by thorough sifting that it can be known how much a witness has allowed his memory to be warped by subsequent suspicions. The conclusiveness of circumstantial evidence depends entirely on the assurance that facts have been truly seen and sworn to.

It was error to refuse to allow the witness Ribble to be impeached by testimony to contradict his denial, on cross-examination, of the part he had taken in getting up testimony: *Geary* v. *People*, 22 Mich. 220. But the evidence of his statements in other cases, or generally of his being open to bribery, do not come within any recognised rule of impeachment unless they have made him a reputation for untruthfulness, and then it is only the reputation, and not its cause, which is admissible. It was not error to allow a witness to be asked if he had deserted or had been charged with crime. There was no attempt to impeach by contradiction on these collateral matters, and the answers were admissible. The impeachment of Fuller by the witnesses Young and Jane Sheethy should have been received. He had been asked about his statements to them concerning his testimony in this case, and had denied making such

statements. The place and time were fixed with reasonable certainty, no objection for uncertainty being made when he was cross-examined, and his answers having been positive and sweeping, his statements that he had been offered a bribe, and would swear for it, were material. The same remark applies to the impeachment of Thomas Mulvany, where time and place were fixed accurately and the fact was recent.

Several questions of an impeaching nature were excluded on the ground that the witness Fuller had made disclosure of the facts to his counsel, and they were therefore privileged. The rule of privilege was misconstrued. We are not disposed to narrow or hamper privileged communications between clients and their attorneys or counsel. We concur fully in the broad and sensible doctrine laid down by Lord SELBORNE, in *Minot* v. *Morgan*, L. R. 8 Ch. Ap. 361, that neither client nor attorney can be compelled to answer and disclose matters of confidence. But the privilege is one created solely for the benefit of the client, and there is no ground for protection where he waives it: 1 Greenl. Ev. § 243; 1 Stark. Ev. 40; *Benjamin* v. *Coventry*, 19 Wend. 353. When a co-defendant in a criminal case turns state's evidence and has tried to convict others by proof also convicting himself, he has no right to claim any privilege concerning any of the facts bearing upon the issue. He has waived all privileges which would permit him to withhold anything: *Foster* v. *People*, 18 Mich. 266. It was expressly held in *Alderman* v. *People*, 4 Mich. 414, that this waiver covered confidential communications to attorneys, and there is no more reason for saving these than for saving the privilege against criminating himself. Each may be waived, and is by such criminating disclosures conclusively waived. Both client and counsel may be compelled to disclose the client's statements which are pertinent to the issue.

The witness Gayton, having been sworn to sustain Fuller's reputation for truth and veracity, was asked whether he had not said at a certain time and place that he would not believe Fuller under oath, and answered that he did not think he had done so at that time, but it was likely that he might have said so at the time of Fuller's arrest for this crime. This answer was stricken out as not responsive. He was then asked whether the arrest affected his opinion of Fuller one way or the other. This was ruled out, as well as a proposition to show his statements to different persons

to the same effect, that he would not believe Fuller under oath. If the answer was relevant, the objection that it was not responsive did not concern the prosecution. The party examining a witness may sometimes object to volunteered and irresponsive statements made by a witness aside from his questions. But if he is willing to accept the answer, and if it was one he would have a right to elicit, the opposite party cannot complain. There are cases, as in *Greenman* v. *O'Conner*, 25 Mich. 30, where the deposition of a witness is taken on settled written interrogatories, when an answer not called for may be objected to by either party for surprise, inasmuch as if the question had been so put in writing as to call for it, other interrogatories might have been framed accordingly, which might have led to explanation. But no such difficulty can arise where the witness is examined openly and orally, and where a question calling for such an answer would have been competent.

The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose, and a reputation which would not affect a witness so far as to touch his credibility under oath, could have no proper influence. The English text-books and authorities have always required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate (1) to their knowledge of the reputation for truth and veracity, of the assailed witness, and (2) whether from that reputation they would believe him under oath.

The only controversy has been whether the grounds of belief must be confined to a knowledge of reputation for veracity only: 1 Starkie's Ev. 237 *et seq.*; 2 Phil. Ev. (Edwards's Ed.) 955-8; and a very recent decision in *Queen* v. *Brown and Hedley*, L. R. 1 C. C. R. 70. The reason given is that unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it is settled that they are not bound to disregard a witness, entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has been commonly observed that to impeaching questions, witnesses, in spite of caution, base their answers on bad character generally, which

may or may not be such as to impair confidence in testimony. When the question of credit under oath is distinctly presented, the answers will be more cautious. The English rule was never very seriously questioned until Mr. Grenleaf's statement in his work on evidence, that the American authorities disfavored it: 1 Greenl. Ev., sec. 461. Of the cases he there refers to, not one contains a decision on the question, and only one contains more than a passing dictum not in any way called for: *Phillips* v. *Kingfield*, 1 Appleton 375. The authorities referred to in that case contained no such decision, and the court declared the question not presented by the record for decision. Phillips's and Starkie's American editors allude to no such conflict. *Webber* v. *Hanke*, 4 Mich. 198, does not properly dispose of the matter. The objection alleged to such an answer by a witness is that it enables him to substitute his own opinion for that of the jury, but this is fallacious. The jury cannot understand the matter if they do not know the ground for the witness's opinion. It is the same sort of difficulty which arises in regard to insanity, disposition, temper, distances, velocities, &c., where a witness is only required to show his means of information, and then state his conclusion or belief based on those means. If six witnesses are merely allowed to state that one's reputation is bad, and as many say it is good, without being questioned farther, the jury cannot be said to know much about it, nor would any cross-examination be worth much, unless it aided them in finding out just how far each witness regarded it as tainted. So far as the reports show, the American decisions are decidedly in favor of the English doctrine, and we have not found any considerable conflict: *People* v. *Mather*, 4 Wend. 229; *People* v. *Rector*, 19 Wend. 569; *People* v. *Davis*, 21 Wend. 309; *Titus* v. *Ash*, 4 Foster 319; *Boyle's Exrs.* v. *Kreitzer*, 46 Penn. St. 465; *Lyman* v. *Philadelphia*, 56 Penn. St. 488; *Knight* v. *House*, 29 Md. 194; *Stevens* v. *Irwin*, 12 Cal. 306; *People* v. *Tyler*, 35 Cal. 553; *Eason* v. *Chapman*, 21 Ill. 35; *Wilson* v. *State*, 3 Wis. 798; *Stokes* v. *State*, 18 Ga. 17; *Taylor* v. *Smith*, 16 Ga. 7; *Ford* v. *Ford*, 7 Humph. (Tenn.) 92; *McCutcheon* v. *McCutcheon*, 9 Port. (Ala.) 50; *Mokley* v. *Hamit*, 1 A. K. Marsh. (Ky.) 590; *United States* v. *Van Sickle*, 2 McLean 219. Mr. Greenleaf himself intimates that it might be a proper inquiry on cross-examination. We think the inquiry proper when properly confined and guarded, and not left to depend on any basis but the

reputation for truth and veracity. And we also think that the cross-examination on impeaching or sustaining testimony should be allowed to be full and searching. Where an impeached witness has changed his domicil his reputation in both places may be shown within a reasonable limit of time. But, as the only object is to know whether he is to be believed at the time when he testifies, a witness knowing his reputation then should state that knowledge, although he may also be authorized in addition to show what his reputation had been elsewhere before.

The court should not have allowed the jury to consider any counts except those that charged all the defendants, or any except those that related to the burning with intent to defraud the insurers. No others specified any offence of which all could possibly have been guilty, and upon the rest there should have been a discontinuance or acquittal.

Fuller's testimony as an accomplice was properly left to the jury to believe or not, whether standing alone or corroborated. It was proper for them to consider all the circumstances of his employment and conduct as affecting his credit, but they could not be directed what force to give these matters. While a jury cannot be compelled to discredit all the testimony of a witness who has wilfully falsified, yet they may do so if they do not trust it. They should not have been instructed that there was any condition on which they were forbidden to reject his testimony, if they do not believe it.

The court below refused to give the following instruction: "This is a criminal trial on an information for felony, and all the questions of law and fact in the case are exclusively for the jury, and the jury are paramount judges both of the law and the facts." The court held that they were judges of the law and fact under some conditions and restrictions, but not in the absolute way indicated. The precise definition of a jury's rights in criminal cases is easier understood than expressed. Their decision upon a prisoner's guilt or innocence can never be directly reviewed, and upon an acquittal there can be no new trial. But if they have the legal authority claimed in the request their verdict of guilty would be of the same force as their acquittal. Exceptions have usually been allowed in this country to the court's rulings on the trial, and if erroneous the conviction will be set aside, because the jury is expected to follow the charges given, and it is as contrary

to law to refuse a proper charge as to give an improper one. The law does not favor unnecessary intrusions by one functionary upon the ground of others. But the judge's charge in criminal cases is one of the traditionary incidents of a trial, and the great body of authority holds it is meant to be for the guidance and instruction of the jury and entitled to their respect. It is true that in criminal cases juries cannot find a conviction against their consciences, and cannot be questioned upon their verdict. At common law a conviction was as final as an acquittal, and could only be relieved by a pardon. This immunity from censure or review is necessary to liberty. In dealing with crimes a jury cannot be compelled to separate the facts from the law. The right to give a general verdict is essential to the integrity of the system, and experience has shown that special verdicts have not been favorable to justice. But though it is within the power of juries to act upon their own views of the law, it does not follow that the law does not assume that they will respect the court's instructions.

The power of juries in civil and criminal cases is the same in kind though different in degree. The practice of disregarding or relieving against wrong verdicts is largely of modern growth. Though they may be set aside, they cannot be reviewed or altered. And setting them aside as against law is a matter of discretion and not of right. An appellate court can only review the action of the judge, not that of the jury, and this, too, not by virtue of the old law, but by force of statutes, which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by the persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact or of forcing cases into rigid forms and arbitrary classes. It is especially important where guilt depends on a wrong intent, to give full weight to every circumstance that can possibly affect it, and professional persons are constantly tempted to make the law symmetrical by disregarding small things. But it is necessary for public and private safety that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known except through the action of courts. It may be fairly regarded as one of the best features of the jury system that

the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity, and usually including in this number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way over-nicety and technicality become less dangerous, if not absolutely harmless, and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

But if the court is to have no voice in laying down these rules, there can be no security whatever either that the innocent may not be condemned, or that society will have any defence against the guilty. A jury may disregard a statute as freely as any other rule, and a fair trial in time of excitement would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public need it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one. We must construe the jury system, like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of the common law, and it has been fixed by our constitutions as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law, and looking to that we find that the judge has always assumed to give the jury instructions upon the law. While there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reserved cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any ground of complaint it would not be for wrong instructions, but for giving any charge at all. It is hard to deal with arguments which assume to qualify a system,

and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a puppet, is not the jury system which we have inherited. If the charge is proper it can only be so because it is to be respected. If juries disregard it they may be free from personal risks, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The uniform practice and the decided weight of opinion is to require that the judge give his views of the law to the jury as authority and not as a matter to be submitted to their review. And while we recognise the power of the jury to give wrong verdicts or disregard the law, usage and authority warrant us in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just. This question was presented many years ago to the Supreme Court of this state, but their decision, if made, was not reported and is not found: *People* v. *Supple*, January Term 1853.

There is undoubtedly some difference between civil and criminal cases in regard to legal presumptions which will prevent a judge from instructing a jury in the same way as to their weight: *Maher* v. *People*, 10 Mich. 212. It is well remarked that "artificial presumptions can never be safely established as means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals who might otherwise have escaped: 2 Hale 289. For such presumptions the common law is most abhorrent, and happily our statute-book has not been disgraced by many violations of the common law in this respect:" Starkie Ev. 743, note f., ed. of 1869. There is no conclusion or presumption of fact which is not entirely within the disposal of the jury, and it is also entirely for them to determine what portion of testimony to believe or disbelieve; and "it is the conscience of the jury that must pronounce the person guilty or not guilty:" 2 Hale 313.

Judgment reversed, and new trial granted.